
Volume 91
Issue 4 *Dickinson Law Review* - Volume 91,
1986-1987

6-1-1987

Surrogate Motherhood Agreements and the Law in Pennsylvania

John M. Suender

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

John M. Suender, *Surrogate Motherhood Agreements and the Law in Pennsylvania*, 91 DICK. L. REV. 1085 (1987).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol91/iss4/8>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Surrogate Motherhood Agreements and the Law in Pennsylvania

I. Introduction

A. *Scope of Comment*

I signed on an egg. I didn't sign on a baby girl; a clone of my other little girl [I]n the delivery room as my baby girl was being born, I knew I was not going to give her up.¹

On March 27, 1986, Melissa Elizabeth, as named by her biological father, or Sarah Elizabeth, as named by her biological mother, or Baby M, as referred to by the New Jersey courts² and the press, was born. Although born healthy, Baby M is not an ordinary child. She is the product of a surrogate mother contract and the object of a suit for breach of contract, specific performance and custody.³

Shortly after Baby M's birth, her natural mother realized she could not "freely surrender custody [of Baby M] to the natural father . . . and terminate all parental rights to said child," as required by a surrogate contract she had entered into with the father.⁴ In response, the natural father sought and received a temporary custody order and sued for specific performance. The biological mother and her husband fled to Florida with the child. When officials discovered the couple three months later, the natural father and his wife regained custody of Baby M, and the attorneys prepared for battle.⁵

This case is the first to seek full adjudication of the validity of a surrogate contract after the mother has refused to relinquish custody of the child. This refusal, however, was not the first. For instance, one surrogate reneged on her contract during pregnancy after she learned that the biological father's wife had undergone a sex-change operation to become a woman. The biological father dropped his suit to avoid publicity about his wife's past, feeling it would prevent the child from having a normal life.⁶

1. National Law Journal, Sept. 29, 1986, at 8, col. 3. (Quoting Marybeth Whitehead — surrogate mother of Baby M.)

2. In the Matter of Baby M, FM-25314-86E (Sup. Ct. N.J., Chancery Division, Family Part).

3. National Law Journal, Sept. 29, 1986, at 8, col. 3.

4. *Id.* at 8, col. 2.

5. *Id.* at 8, col. 2-3.

6. *Id.* at 10, inset col. 2-3.

A more chilling example of the potential problems surrounding the use of surrogate mother contracts involved the birth of a child born with microcephaly, a condition characterized by an abnormally small head and increased likelihood of mental retardation. The biological father both refused to accept the child and to pay for the child's medical expenses. A court ordered him to do so. The dispute was settled on national television, where blood test results revealed that the surrogate's husband was the father-in-fact. The surrogate mother and her husband then admitted to the birth of a prior child with microcephaly who had died as a result of the disease.⁷

This Comment is concerned with the legal issues surrounding the practice of surrogate motherhood by artificial insemination.⁸ The typical surrogate mother agreement has two or three participants: the sperm-donating father, the surrogate, and if married, her husband.⁹ Many factors might compel or persuade a couple to choose surrogate parenting as an alternative to natural childbearing.¹⁰ The

7. *Transcript of Donahue Television Interview*, No. 02023 (Feb. 2, 1983).

8. Artificial insemination by donor (AID) is the process of impregnating a woman by injecting the sperm of a man who is not her husband into her vagina or uterus. Wadlington, *Artificial Conception: The Challenge of Family Law*, 69 VA. L. REV. 465, 468 (1983). This procedure is used frequently in the United States, resulting in as many as 20,000 births per year. Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, 70 A.B.A. J. 50 (August, 1984). AID differs from surrogate parenting by AID in that the mother retains custody of the child in the former and the sperm donor retains custody of the child in the latter. Wadlington, *supra*, at 475.

The reader should not confuse surrogate motherhood with either *in vitro* fertilization, or embryo transplant. *In vitro* fertilization is also known as test-tube reproduction. The procedure involves removing mature ova from the woman, fertilizing the ova, and then replacing the ova in the same woman or a third party. See Wadlington, *supra*, at 473-74. Embryo transfer is the opposite of AID. A woman, after undergoing artificial insemination, has the egg flushed from her uterus and implanted in the wife of the sperm donor. Brotman, *Human Embryo Transplants*, N.Y. Times, Jan. 8, 1984, § 6 (Magazine), at 42.

9. For a detailed surrogate mother contract see Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. LAW, 263 (1981-82). Some of the major provisions are: Surrogate and her husband will not form a parent-child relation with the child, sec. II, at 267; surrogate and her husband will agree to terminate parental rights as soon as legally and medically possible, sec. III, at 268; the consideration, sec. V, at 270-72; agreement to undergo paternity test, sec. VI, at 274; assumption of risk by surrogate and husband of all risks incidental to child bearing and pregnancy, sec. VIII, at 275; payments in event of miscarriage, sec. XI, at 276-77; indemnification for support order in event custody is awarded to surrogate, sec. XIII, at 277-78; agreements that parties are to remain anonymous, sec. XIV & XVII, at 278; restitution in event of breach by the surrogate and/or her husband, sec. XVIII, at 279; agreement not to abort in absence of medical emergency, sec. XX, at 280; agreement by natural father to accept child born with congenital abnormalities, sec. XXI, at 282; procedure should natural father predecease birth of child, sec. XXII, at 282; agreement by surrogate to adhere to medical instructions, sec. XXIV, at 282-83; severability, sec. XXVI, at 283.

10. The woman may be infertile or unable to carry a child to term. Fifteen to twenty percent of American couples of child-bearing age are infertile. Of these, sixty percent are infertile due to the woman's inability to conceive or carry a child to term. Handel & Sherwyn, TRIAL 57 (April 1982). Another fear of many couples is the threat of a genetic related disease or defect. P. REILLY, GENETICS, LAW & SOCIAL POLICY 190 (1977).

logical alternative is adoption; however, this choice may be inferior because it entails many uncertainties, such as a shortage of adoptable children¹¹ and the typically long period of waiting until an adoptable child is available.¹² Moreover, the surrogate mother agreement provides a strong alternative to adoption because it allows a couple to have a child that is biologically related to one of the parents.¹³

This Comment focuses only on the typical surrogate mother agreement, which involves the surrogate, her husband and the biological father.¹⁴ The main thrust of the Comment involves the determination that such agreements are not void, and the identification of the legal consequences and remedies for any breach that occurs.

B. History and Case Law

Now Sarah, Abraham's wife, bore him no children. She had an Egyptian maid whose name was Hagar . . . And Sarah said to Abraham, "Behold now, the Lord has prevented me from bearing children; go unto my maid; it may be that I shall obtain children by her." . . . And Hagar bore Abraham a son . . .¹⁵

As evidenced by this quote from *Genesis*, surrogate mothering is one of the oldest alternatives for infertile couples who want children. In recent years, however, the concept has become a center of public controversy.¹⁶ At least two clinics, Surrogate Parents' Foundation Inc., in California, and Surrogate Parenting Association, in Kentucky, perform screening services to match willing and able surro-

Beyond these legitimate fears, and the consideration of the mother's age, is a more modern trend among women—an unwillingness to interfere with their careers. Some commentators suggest that this is a wholly unethical and unacceptable reason for selecting surrogate motherhood. See Wall Street Journal, Sept. 9, 1986, at 41, col. 2 (American Fertility Society deems surrogate motherhood agreements unethical when used for non-physical reasons). But cf. REILLY, *In Vitro Fertilization: A Legal Perspective*, in GENETICS AND THE LAW 359 (1976) (arguing such a distinction is an unacceptable form of value imposition).

11. W. MEEZAN, S. KATZ & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* (1978). The shortage is attributed to increased birth control, abortion and willingness of unwed mothers to raise children. *Id.* at 9.

12. The wait is estimated at three to seven years. *Adoption and Foster Care 1975: Hearing on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 6 (April 28-29, 1975).

13. The child born to a surrogate mother is biologically related to the sperm-donating husband of the adopting mother.

14. It does not address the entry into surrogate mother contracts by single persons or homosexual couples. In Pennsylvania, however, any individual may adopt a child. 23 PA. CONS. STAT. § 2312 (1981).

15. *Genesis* 16:1, 2, 15.

16. See, e.g., *Transcript of Donahue Television Interview*, No. 02023 (Feb. 2, 1983). (During this program, the husband of the surrogate and the purported sperm donor of a child born with an abnormally small head announced the results of a paternity test. The test revealed the former was actually the father of the child!)

gates with infertile couples.¹⁷ Surrogate motherhood contracts have created controversy in several states as their popularity grows.¹⁸

To date, four states have faced the issues of the legality and enforceability of surrogate mother agreements.¹⁹ The Michigan Appellate Court was the first to rule on the legality of a surrogate mother contract.²⁰ In *Doe v. Kelley* an infertile couple²¹ sought to have the court declare certain adoption statutes,²² which made it illegal for one to procure an adoption of a child with consideration, unconstitutional on the grounds that the statute infringed upon the couples' fundamental right to privacy.²³

The court agreed that the decision to bear or beget a child is a fundamental right protected by the United States Constitution²⁴ and that the statute did not prohibit the use of a surrogate mother.²⁵ The court ruled, however, that the statute legitimately prohibited the exchange of money in conjunction with the use of the state's adoption procedures.²⁶ The court stated that the contract attempted to use the adoption statutes to change the legal status of the child, which was not protected by a fundamental right of privacy.²⁷

The Supreme Court of Kentucky recently ruled on the legality and enforceability of surrogate agreements in *Surrogate Parenting Associates, Inc. v. Kentucky*.²⁸ *Surrogate Parenting* involved an at-

17. Markoutsus, *Women Who Have Babies for Other Women*, GOOD HOUSEKEEPING, Apr. 1981, at 96, 102, 104. A Michigan attorney, Noel Keane, is a strong advocate of surrogate mother agreements. See, e.g., *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W.2d 90 (1983); *Doe v. Kelly*, 106 Mich. App. 169, 307 N.W.2d 438 (1981); cert. denied, 459 U.S. 1183 (1983); N. KEANE, THE SURROGATE MOTHER (1981); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147 (1980).

18. These contracts have been reported in California, Kentucky, Michigan and Texas, see 1979-81 *Report On Human Reproduction and the Law*, LEGAL-MEDICAL STUDIES at II A.9; as well as in New Jersey, see N.Y. Times, Aug. 28, 1986 at A22, col. 1; and in New York, see *Adoption of Baby Girl*, L.J., 132 N.Y. Misc.2d 972, 505 N.Y.S.2d 813 (1986).

19. *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981); *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. Ct. App. 1986); *Adoption of Baby Girl*, L.J., 132 N.Y. Misc.2d 972, 505 N.Y.S.2d 813 (1986). In the Matter of Baby M, FM-25314-86E (Sup. Ct. N.J., Chancery Division, Family Part, 1987).

20. *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

21. "Mrs. Doe" had undergone tubal ligation, which rendered her infertile. *Id.* at 171-72, 307 N.W.2d at 440.

22. MICH. COMP. LAWS § 710.54 (1981). (Prohibits, except for charges and fees approved by court, the offering, giving or receiving of money or other valuable consideration for placing a child for adoption, for locating a child for adoption, or for receipt of compensation for the release, consent or petition for adoption.)

23. 106 Mich. App. at 173, 307 N.W.2d at 440.

24. *Id.* at 174, 307 N.W.2d at 441 (citing *Mahrer v. Roe*, 432 U.S. 464 (1977)).

25. 106 Mich. App. at 173-74, 307 N.W.2d at 441.

26. *Id.* at 174, 307 N.W.2d at 441.

27. *Id.*

28. *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. Ct. App. 1986).

tempt by the state attorney general to have the corporate charter of the defendant revoked.²⁹ The attorney general alleged that the defendant's activities in surrogate parenting agreements were an abuse and misuse of corporate powers and detrimental to the interest and welfare of the state.³⁰

In support of his charge, the Attorney General asserted that surrogate mother contracts constituted baby-selling in contravention of Kentucky laws.³¹ The court disagreed, finding that the legislature had not spoken on the practice of surrogate motherhood.³² In distinguishing surrogate mother agreements from the baby-selling situation the court stated:

There is no doubt but that the [baby-selling statute] is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child. But the central fact in the surrogate parenting procedure is that the agreement to bear the child is entered into *before* conception. The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are *not* avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring. The problem is caused by the wife's infertility. The problem is solved by artificial insemination. The process is not biologically different from the reverse situation where the husband is infertile and the wife conceives by artificial insemination.³³

The court went on to hold that surrogate contracts were voidable, but not void.³⁴ It concluded that any statement as to the illegality of these contracts must be made by the legislature.³⁵

New York is the third jurisdiction which has considered the legality and enforceability of surrogate mother agreements. In *Adop-*

29. *Id.* at 210.

30. *Id.*

31. KY. REV. STAT. § 199.590(2) (1985), which prohibits sale, purchase or procurement for sale or purchase of any child for the purpose of adoption; *see also* KY. REV. STAT. § 199.601(2) (1985), which prohibits voluntary termination of parental rights before five days after birth of the child; *see also* KY. REV. STAT. § 199.500(5) (1985), which prohibits the consent to adoption prior to five days after birth of the child.

32. *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 S.W.2d at 211.

33. *Id.* at 211-12 (emphasis added).

34. *Id.* at 213.

35. *Id.* at 214.

tion of *Baby Girl, L.J.*³⁶ neither party was seeking to avoid a surrogate mother contract. Rather, the court was ruling on the validity of a proposed private adoption.³⁷ The court cited both *Kelley*³⁸ and *Surrogate Parenting*.³⁹ In following the reasoning of the latter, the court stated that biomedical science has advanced into a new era of genetics which was not contemplated by either the Kentucky or New York legislatures.⁴⁰ It also noted the inherent differences between baby-selling and surrogate agreements. The court agreed that such contracts were voidable, and not void,⁴¹ and that it was the duty of the legislature specifically to allow or disallow any payments to the surrogate.⁴² Ultimately, the adoption was granted and the surrogate was allowed to collect her fee.⁴³

The final jurisdiction to rule on the enforceability of these contracts is also the most controversial. A New Jersey trial court, in *In the Matter of Baby M*, upheld a surrogate mother contract and specifically enforced the contract. Judge Harvey R. Sorkow held that neither adoption laws or public policy prohibit surrogate agreements. The opinion was a sort of hybrid which merged contract law with the test for the "best interest of the child," and it then utilized the court's *parens patriae* power to protect the interests of the child.⁴⁴ Judge Sorkow wrote:

This court holds that whether there will be specific performance of this surrogacy contract depends on whether doing so is in the child's best interests . . . Any other result would indeed conflict with the court's role as *parens patriae* . . . An agreement between parents is inevitably subservient to the considerations of the best interests of the child. The welfare of a child cannot be subscribed by an agreement of the parents . . . It must follow that "best interests" are paramount to the contract and this court must answer a best interests inquiry if it is to specifically perform the surrogate parenting agreement.⁴⁵

The opinion relies on well settled custody law that a custody agreement is voidable, but not void. In short, the Judge held that the

36. 132 N.Y. Misc.2d 972, 505 N.Y.S.2d 813 (1986).

37. *Id.* at 814.

38. *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438.

39. *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 S.W.2d 209.

40. *Adoption of Baby Girl, L.J.*, 132 N.Y. Misc.2d 972, 505 N.Y.S.2d at 817.

41. *Id.*

42. *Id.*

43. *Id.*

44. FM-25314-86E (Sup. Ct. N.J., Chancery Division, Family Part).

45. *Baby M. Ruling May Invite Attack*, 119 N.J.L.J. 606 (col. 3, April 9, 1987).

contract must be in the best interests of the child, and if it is, then the contract is specifically enforceable.

II. The Legality of Surrogate Parenting Agreements in Pennsylvania

This section of the Comment analyzes the various legal issues that might render a surrogate motherhood agreement illegal in Pennsylvania. The primary obstacles to a surrogate mother contract are the Commonwealth's baby-selling statute⁴⁶ and related principles of public policy.⁴⁷ Questions might also arise concerning adultery⁴⁸ and the illegitimacy of the child.⁴⁹ If and when the Pennsylvania courts are confronted with the issue of the legality of surrogate agreements, the outcome should be that the contracts are voidable, but not void.⁵⁰

A. Baby-Selling

Superficially, a typical baby-selling statute seems to disallow surrogate parenting agreements.⁵¹ Pennsylvania's baby-selling statute provides: "A person is guilty of a misdemeanor of the first degree if he deals in humanity, by trading, bartering, buying, selling or dealing in infant children."⁵² However, close scrutiny of the surrogate situation, as well as an analysis of the intention behind this statute, reveals that the statute does not govern.

Because the statute is penal in nature it must be strictly construed.⁵³ The question arises whether the typical surrogate agree-

46. 18 PA. CONS. STAT. § 4305 (1982).

47. The public policy argument normally suggests that the payment of a fee for the child endangers the child's psychological well-being by treating the child as a mere commercial object. See Maudsley, *Surrogate Parenthood: A Need for Legislative Direction*, 71 ILL. B.J. 412 (1983); but cf. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147 (1980) (suggesting the policy of commercialization is the norm in the United States when seeking to fulfill a need).

48. See *infra* notes 105-09 and accompanying text.

49. See *infra* notes 110-11 and accompanying text.

50. See, e.g., *Commonwealth ex rel Children's Aid Society v. Gard*, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949) (stating "contracts as to the custody of children are voidable agreements . . . and are subject to being set aside by the courts in the best interests of the child.")).

51. *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), (holding that surrogate parenting agreements were in contravention of the state's baby-selling statutes).

52. 18 PA. CONS. STAT. § 4305 (1982).

53. 1 PA. CONS. STAT. § 1928(b)(1) (1972). Strictly construed is defined as meaning that:

[T]he court will not extend punishment to cases not plainly within the language used, but at the same time such statutes are to be fairly and reasonably construed, and will not be given such a narrow and strained construction as to exclude from their operation cases plainly within their scope and meaning.

BLACK'S LAW DICTIONARY 1275 (5th ed. 1979).

ment falls plainly within the language and scope of the statute.⁵⁴ There is no doubt that these statutes are intended to keep the overbearing baby-broker from inducing a single, expectant mother, who is unwilling or unable to raise a child, to sell her child.⁵⁵ The typical baby-selling situation may also involve a financially burdened couple,⁵⁶ or a couple who simply want to profit by selling their unexpected baby to a broker.

The essential contemplation of the surrogate mother arrangement is to assist an infertile couple that desperately wants a child but is unable to conceive. The distinction is one of timing.⁵⁷ The surrogate is not pregnant when the agreement is executed.⁵⁸ Therefore, the concerns for overreaching, overbearing or even undue duress are not present.⁵⁹ The surrogate is in a position to accept or reject the agreement without the powerful influence of already carrying a baby.⁶⁰ Further, she need not worry about whether she can afford to raise the child, whether she should abort the child, or whether she wants to raise the child.

Clearly, the statute does not contemplate the surrogate mother situation.⁶¹ To hold that such agreements fall plainly within the meaning of the statute is to legislate from the bench.⁶² Further, it is absurd to argue that the father is purchasing his own child.⁶³ In es-

54. See 1 PA. CONS. STAT. § 1928(b)(1) (1972).

55. See *Surrogate Parenting, Inc.*, 704 S.W.2d at 211; see also note 33 and accompanying text; see also *Adoption of Baby Girl, L.J.*, 132 N.Y. Misc.2d at 977, 505 N.Y.S.2d at 817 (stating New York Statute was designed to keep baby brokers from coercing expectant mothers or parents with financial inducements to part with their child).

56. *Surrogate Parenting, Inc.*, 704 S.W.2d 209; *Adoption of Baby Girl, L.J.*, 132 N.Y. Misc.2d 972, 505 N.Y.S.2d 813.

57. See *supra* note 33 and accompanying text.

58. The potential for feelings of guilt or loss on the surrogate mother's part is minimized because the mother consciously chooses to bear a child before conception. Keane, *Legal Problems*, *supra* note 17, at 153.

59. See *supra* note 33 and accompanying text.

60. *Id.*

61. See *Adoption of Baby Girl, L.J.*, 132 N.Y. Misc.2d at 977, 505 N.Y.S.2d at 817. See also *supra* note 55.

62. In *Adoption of Baby Girl, L.J.*, 132 N.Y. Misc.2d at 978, 505 N.Y.S.2d at 818, the court stated:

Current legislation does not expressly foreclose the use of surrogate mothers or the compensation to them under parenting agreements. Accordingly, the court finds that this is a matter for the legislature rather than for the judiciary to attempt to determine by the impermissible means of "judicial" legislation. In its absence, this court will not appropriate the function of the legislature . . . As with any contractual agreement, especially as it relates to adoption, the court will continue to review such contracts and the circumstances surrounding them to determine whether there has been any overreaching, unfair advantage, fraud, undue influence, or excessive payments.

In this case \$10,000 was not deemed excessive. *Id.* at 974, 505 N.Y.S.2d at 815.

63. It is the express intention of the Pennsylvania Legislature that none of its statutes

sence, the father is paying for the custody of the child, and a contract for child custody in Pennsylvania is voidable, but not void.⁶⁴

B. Public Policy

A strong reason for holding that surrogate motherhood agreements are not in contravention of the baby-selling statute is that most courts consider custody contracts which exchange the child for valuable consideration, not in light of the statute, but rather in light of public policy.⁶⁵ The argument has been advanced that, notwithstanding the non-applicability of baby-selling statutes, surrogate parenting agreements are void as against public policy.⁶⁶

The precise definition of public policy in contract situations is elusive. The Pennsylvania Supreme Court has stated that for a contract to be void on public policy grounds:

[it] "must be inconsistent with sound policy and good morals as to the consideration or thing to be done." If, by *well settled judicial precedent*, the law has determined that such a contract as this tends to the injury of the public, or is inconsistent with sound morality, we would feel bound to follow the law thus declared, without regard to our own notions of the tendency of the contract.⁶⁷

Hence, we must look to *well settled judicial precedent* in determining the validity of surrogate agreements.

In *Enders v. Enders*,⁶⁸ the court used this definition to declare that a contract between a woman and her father-in-law, whereby the woman agreed to surrender custody of the child in exchange for \$20,000 to her and \$10,000 to her child, was not against public pol-

create an absurd result. 1 PA. CONS. STAT. § 1922(1) (1972). The result would be different if the natural father's wife were a party to the contract. Clearly, she would be paying for adoption and custody of the child. See Brophy, *supra* note 9, at 264, (making adoptive mother a party to the contract would violate all states' bans against "buying children").

64. See, e.g., *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949); *Stapleton v. Dauphin County Child Care*, 228 Pa. Super. 371, 324 A.2d 562 (1974) (contract providing agency right to remove child from foster parents is voidable when best interests of child conflict with the contract).

65. See, e.g., *Enders v. Enders*, 164 Pa. 266, 30 A. 129 (1894); *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. 85, 66 A.2d 300; *Gorden v. Cutler*, 324 Pa. Super. 35, 471 A.2d 449 (1983); *Reimche v. First National Bank of Nevada*, 512 F.2d 187 (9th Cir. 1975).

66. See OP. KY. ATTY. GEN., 81-18, 7 FAM. L. REP. 2246 (BNA 1981). The argument was expressly rejected in *Surrogate Parenting Assoc. Inc. v. Kentucky*, 704 S.W.2d 209 (1981).

67. *Enders v. Enders*, 164 Pa. at 271, 30 A. at 130.

68. *Id.*

icy.⁶⁹ The court relied heavily on the fact that this was a family compact entered into wholly for the welfare of the child.⁷⁰ The court also stated that a contract between strangers, entered into solely for the purpose of avoiding parental duty and gaining the benefit of the bargain, was against public policy.⁷¹

A recent Pennsylvania case held that a custody contract benefiting a child will not *ipso facto* be categorized as against public policy without first looking at the facts of each case.⁷² In *Gorden v. Cutler*, the court was asked to rule on the validity of a contract whereby the mother granted consent to adopt in exchange for the adopting couple's promise to pay her medical expenses.⁷³ The court pointed out that such an agreement was *nowhere* prohibited⁷⁴ by Pennsylvania's adoption laws.⁷⁵

To the contrary, the court in *Gorden* noted that the legislature made repeated reference in the Report of Intention to Adopt,⁷⁶ and in the Report of Intermediary,⁷⁷ to the documentation and itemization of "monies and consideration paid or to be paid to or received by the intermediary or to or by any other person or persons to the knowledge of the intermediary by reason of the adoption placement."⁷⁸ The court concluded that the payment of money, at least for medical expenses, was not foreign to the legislature.⁷⁹

The court went on to discuss *Enders*, and stated that it was only tangentially related to the situation at hand because *Enders* involved a family compact.⁸⁰ The court held that in a situation where no family compact was involved, consideration paid that did not inure to the benefit of the child was illegal.⁸¹ Hence, payment of medical expenses to the mother was in the best interest of the child she was carrying and was valid.⁸² In the case of monies that inured to the

69. *Id.* at 273, 30 A. at 131.

70. *Id.* at 273-74, 30 A. at 130.

71. *Id.* at 273, 30 A. at 130.

72. *Gorden v. Cutler*, 324 Pa. Super. 35, 51-52, 471 A.2d 449, 457 (1983).

73. 324 Pa. Super. 35, 471 A.2d 449.

74. *Id.* at 49, 471 A.2d at 455-56.

75. 23 PA. CONS. STAT. §§ 2101-2910 (1985).

76. 23 PA. CONS. STAT. § 2531 (1985). (The report shall set forth an itemized accounting of monies paid or to be paid to the intermediary. *Id.* § 2531(b)(4).)

77. 23 PA. CONS. STAT. § 2533 (1985).

78. *Id.* § 2533(b)(8) (1985).

79. *Gorden v. Cutler*, 324 Pa. Super. at 49, 471 A.2d at 456.

80. *Id.* at 50, 471 A.2d at 456.

81. *Id.* at 53, 471 A.2d at 458.

82. *Id.* at 50, 471 A.2d at 457. The court stated:

It is commonly the case that persons wishing to adopt a child will make provisions with its mother, or mother and father, to pay hospital and medical expenses in connection with the care of the mother and child. There is nothing in

benefit of the mother only, the contract would be void.⁸³

In *Commonwealth ex rel. Children's Aid Society v. Gard*, the agency had contracted with the Gards to provide a foster home for children in return for board, clothing, and medical care.⁸⁴ The agency retained the right to regain custody at any time, and litigation erupted when it attempted to do so. In refusing to uphold the agency's rights, the supreme court stated: "[T]he child was treated as a chattel without any rights in respect to its own happiness and physical well-being. That a child cannot be made the subject of a contract with the same force and effect as if it were a chattel has long been established law."⁸⁵ The court further noted that because the contract "came into being not for the [agency's] benefit, but for the child's benefit . . . it [would] be given only such legal effect as [would] serve the purpose of its creation."⁸⁶ The Gards received custody based upon the long and affectionate relationship that had developed between them and the infant.

By combining the rationales of these three cases, a set of rules can be developed to apply to the surrogate parenting agreement. First, medical expenses paid to the pregnant woman are legal because they are in the best interests of the child.⁸⁷ Second, *outside a family compact*, payment above and beyond medical expenses are void as against public policy.⁸⁸ Third, the contract must be read in the light of the best interests of the child, as the child cannot be viewed as a chattel without any rights in respect to its own happiness and physical well being.⁸⁹

It can be questioned whether the surrogate mother agreement is really a family compact. In *Enders*, the contract involved was between the mother and her ex-husband's father. In the surrogate situation the contract is between the mother and father of the child, although they are not married. Exactly what type of relationship creates the family compact? Is it marriage, or is it a relation between

this practice inimical to public policy. Indeed, it is productive of the welfare of the child.

Id.

83. See *id.* at 53, 471 A.2d at 458.

84. 362 Pa. 85, 66 A.2d 300 (1949).

85. *Id.* at 92, 66 A.2d at 304, *quoted in* *Gorden v. Cutler*, 324 Pa. Super. at 51, 471 A.2d at 457.

86. *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. at 96, 66 A.2d at 306, *quoted in* *Gorden v. Cutler*, 324 Pa. Super. at 51, 471 A.2d at 457.

87. 324 Pa. Super. at 50, 471 A.2d at 457.

88. See *id.* at 50, 471 A.2d at 456; see also *Enders v. Enders*, 164 Pa. at 270, 30 A. 130.

89. *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. at 92, 66 A.2d at 304. See also *Enders v. Enders*, 164 Pa. at 269, 30 A. at 130 (a contract intended to provide for the welfare of the child is not injurious to public good or morals).

the party seeking custody and the child? It is the latter. The mother in *Enders* was hesitant about giving her child away to her father-in-law who lived a considerable distance away. She had a limited relationship with this man because she was separated from his son.⁹⁰ Since the child, however, was biologically related to the grandfather, the court presumed the contract was in the best interests of the child.⁹¹ When an agreement for custody of a child involves a close biological relation between the child and the third party, the court must look beyond the benefit incurring to the mother and focus on the benefits to the child.

The benefits in the surrogate agreement overwhelmingly accrue to the child. But for the contract and the parties' agreement the child would not be born. There is no greater gift than life itself. Further, the whole situation contemplates a couple whose efforts have been frustrated in their attempts to conceive.⁹² They strive for a child biologically related to the father. The presumption follows that this would create a family setting very beneficial to the child.

In light of the relation between father and child, and the benefits which accrue to the child being brought up in a fit family setting, it would be an injustice to void all such agreements on the grounds of public policy. "The fears that approval of such a policy would lead to the bartering or sale of children are not borne out where we deal only with agreements between parents or close family members."⁹³

C. Adoption, Adultery, Illegitimacy

Several commentators have suggested that surrogate mother contracts violate state adoption statutes.⁹⁴ The Pennsylvania Adoption Act requires consent to an adoption by either the adoptee or his parents or guardians, and perhaps by the spouse of the adopting par-

90. *Enders*, 164 Pa. at 266, 30 A. at 129. It is not clear whether the two were actually divorced. However, the father-in-law apparently lived in Delaware County, and the woman lived in Berks County with her father.

91. *Id.* at 267, 30 A. at 130 (stating: "We concede . . . that a contract of a parent, by which he bargains away the custody of a child to a stranger . . . is void as against public policy . . . But this was a family compact.").

92. This Comment does not contemplate situations wherein the couple utilizes a surrogate agreement for reasons other than maternal infertility, inability to carry a child to term, or advanced age. Nevertheless, a distinction between physical and non-physical reasons for choosing surrogate motherhood seems unjust. See *supra* note 10.

93. *Reimche v. First National Bank of Nevada*, 512 F.2d 187, 190 (9th Cir. 1975).

94. Comment, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, [hereinafter *Womb for Rent*] 90 DICK. L. REV. 227, 243 (1985); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1292 (1985) [hereinafter *Modern Family*].

ent.⁹⁵ It further provides that consent given prior to or within 72 hours after the birth of the child is invalid.⁹⁶ The typical surrogate agreement should contain a provision whereby the surrogate agrees to consent to the adoption of the child as soon after birth as is allowed by law.⁹⁷

It has been argued that the application of the adoption statute is inappropriate in the surrogate situation.⁹⁸ In Pennsylvania, all legislation enacted after September 1, 1937 is subject to strict interpretation.⁹⁹ Because the adoption clause of a surrogate contract evidences consent to adoption even before conception, it does not fall plainly within the meaning of the above statute. The opposing argument is that consent still occurred prior to the 72 hour waiting period, and so falls plainly within the meaning of the statute. Thus, it is argued, legislative action is necessary to except the surrogate contract adoption from the general rule.¹⁰⁰

However, neither argument encompasses the entire situation. First, the natural father need not adopt the child, because he is legally recognized as the father once paternity is established.¹⁰¹ Second, the adopting woman is not a party to the contract.¹⁰² Thus, no consideration is being offered in contravention of the adoption statute for premature consent to adoption. Rather, this provision of the contract can be considered surplusage which merely indicates the intention of the parties. Realistically, the statute provides the surrogate mother with the noncontractual option of refusing to consent to the child's adoption.¹⁰³

Furthermore, even if the adopting mother was a party to the contract in violation of the baby-selling statutes, or the early consent clause was held to be in violation of the adoption statute, that would not cause the entire contract to fall. In Pennsylvania, a court can

95. 23 PA. CONS. STAT. § 2711 (1985).

96. *Id.* § 2711(c) (1985).

97. Brophy, *supra* note 9, at 268. The sample contract provides:

The Surrogate and her Husband agree that they will on the (fourth) day after delivery of the child, or as soon thereafter as is medically possible, institute proceedings . . . to terminate their respective paternal rights to said child and sign any and all necessary affidavits, documents, etc. in order to further the intent and purposes of this agreement.

98. See, e.g., Note, *Modern Family*, *supra* note 94, at 1292; Keane, *supra* note 17, at 152-53 (asserting the statute does not contemplate pre-conception consent).

99. 1 PA. CONS. STAT. § 1928 (1972).

100. See *Womb for Rent*, *supra* note 94.

101. This discussion does not concern a dispute between the parties. Rather, it contemplates whether surrogate agreements violate the statute "on their face."

102. See Brophy, *supra* note 9 at 263-64.

103. If the surrogate selects this option she has, of course, breached the contract.

sever that portion of a contract that is in contravention of a statute, provided the remainder of the statute is enforceable with separate consideration.¹⁰⁴

The adoption clause could be severed from the contract, leaving the remainder intact. The separate consideration on the part of the surrogate is the surrender of custody of the child to the biological father. Because contracts for the custody of children are voidable, but not void, the contract is enforceable with or without the adoption clause, and the statute merely affords the surrogate the right to refuse to the adoption of her child by the natural father's wife. If she does not, the state would have no valid reason to prevent adoption.

Other problems which might arise concerning the legality of surrogate agreements concern questions of adultery¹⁰⁵ and illegitimacy.¹⁰⁶ However, in Pennsylvania, the defense of connivance, whereby a spouse consents to the other spouse's adultery, defeats a claim of adultery.¹⁰⁷ In the surrogate mother contract the husband of the surrogate consents to her being artificially inseminated.¹⁰⁸ Furthermore, the idea of calling artificial insemination adultery is absurd.¹⁰⁹ The woman is inseminated by a syringe which she operates, or a doctor operates. No physical or sexual contact with a man other than her husband is involved.

The issue of legitimacy has been resolved in many states by specifically legislating that a child born by way of artificial insemination is presumed legitimate.¹¹⁰ Further, declaring the child illegitimate and voiding the agreement on these grounds defeats a strong state interest in the welfare of the child. In fact, if the surrogate is married the child is legitimate. If not, the surrogate agreement contemplates prompt adoption of the child,¹¹¹ which actually legitimizes the

104. *Frazier v. Thompson*, 2 Watts & S. 235 (1841).

105. See, e.g., *Orford v. Orford*, 58 D.L.R. 251, 49 Ont. L.R. 15 (1921) (artificial insemination is adulterous and hence illegal); *but cf. People v. Sorenson*, 68 Cal.2d 280, 66 Cal. Rptr. 7, 437 P.2d 495 (1968) (finding of adultery is absurd).

106. The problem with characterizing a child born by artificial insemination as illegitimate is that it defeats the strong public policy in favor of the legitimacy of all children. *Gursky v. Gursky*, 39 Misc.2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963).

107. PA. STAT. ANN. tit. 23 § 207(a) (Purdon Supp. 1984-85).

108. See Brophy, *supra* note 9, at 267 (providing: "Husband is in agreement with the purposes, intents, and provisions of this agreement and agrees that his wife, the Surrogate, shall be artificially inseminated . . .").

109. 1 PA. CONS. STAT. § 1922(1) (1972). It is the express intention of the Commonwealth that no statute yields an absurd result.

110. Note, *Modern Family*, *supra* note 94, at 1293 n.74 (listing all states with such a provision; Pennsylvania is not one).

111. See Brophy, *supra* note 9, at 268.

child.¹¹²

III. Rights and Remedies in Case of Breach of the Surrogate Mother Contract

The remainder of this Comment examines the consequences of breach of a surrogate parenting agreement and defines the parties' various rights and possible remedies. Generally speaking, a surrogate agreement can be breached in any one of three distinct time periods: before insemination, during pregnancy, and after birth. Because the legal issues become more complicated with the passage of time, the Comment focuses separately on each of these time periods.

A. Breach Prior to Insemination

It is unlikely that the biological father and his wife ("the couple")¹¹³ will breach before the surrogate is inseminated because they presumably are in desperate want of a child. However, in the event of a breach by the couple at this point, the damages should be easily ascertained. The general rule is that damages for breach of contract are awarded in an amount sufficient to place the aggrieved party in the same economic position she would have been in had the contract been performed, less any amount she was able to mitigate.¹¹⁴ Courts would deny a claim for specific performance if there exists an adequate remedy at law.¹¹⁵ Thus, in the event of breach by the couple, the intended surrogate would be able to recover damages, but not specific performance, because monetary damages would be adequate.

The surrogate is the party more likely to breach at this point. In order to place the couple in as good a position had the contract been performed, specific performance of the contract might be sought. The court, however, would not grant this remedy for several reasons. First, the contract is one for personal services, a type of contract

112. 23 PA. CONS. STAT. § 2521 (1985). A decree of termination of parental rights extinguishes the former parents' rights to notice of any adoption proceeding, grants custody to the adopting parent or agency, and places the adopting person or agency in loco parentis of the child.

113. For the remainder of the text the biological father and his wife will be collectively referred to as "the couple."

114. See, e.g., *Bellefonte Area School District v. Lipner*, 81 Pa. Commw. 334, 473 A.2d 741 (1984); J. CALAMARI & J. PERILLO, *CONTRACTS* 544 (2d ed. 1977) [hereinafter *CALAMARI & PERILLO*].

115. See *Mussoline v. Tax Claim Bureau of Schuylkill County*, 410 Pa. 187, 188 A.2d 740 (1963).

courts hesitate to enforce specifically.¹¹⁶ Second, whenever the execution of a decree of specific performance requires the personal supervision and oversight of the court for a considerable length of time, the court should refuse specific performance and leave the party to his remedy at law.¹¹⁷ Clearly, such a decree would require the court to monitor the mother's behavior for at least the gestation period.

Thus, the couple must seek either legal or statutory remedies. Since there is no legislation in Pennsylvania which deals with surrogate parenting,¹¹⁸ the couple must pursue legal remedies. This gives rise to the problem of accurately ascertaining damages.¹¹⁹

An action for damages is an inadequate remedy at law when damages cannot be accurately computed or ascertained.¹²⁰ Since conception had not yet occurred, it would be difficult to ascertain the amount the couple lost upon breach of the contract.¹²¹ It seems the only amount the couple could recover is for expenses incurred after executing the agreement — restitution.¹²²

The couple may attempt to avoid this dilemma by inserting a liquidated damages clause in the contract. Such a clause is valid and enforceable provided it is a reasonable measure of damages and not a penalty for breach.¹²³ Whether such a provision would be enforcea-

116. See *McMenamin v. Philadelphia Transportation Co.*, 356 Pa. 88, 91, 51 A.2d 702, 703 (1947).

117. See *Reliable Tire Distributors v. Kelly Springfield Tire Co.*, 607 F. Supp. 361 (E.D. Pa. 1985). It seems unlikely that the couple would seek specific performance in this situation, because they would be uncertain of the fitness of the surrogate to perform.

118. See *Womb for Rent*, *supra* note 94, at 241.

119. The uncertainty arises from such factors as the impossibility of knowing that the surrogate would have conceived, or carried the baby to term. Most importantly, the value of having a child would be difficult to compute. Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 84, n.63 (1982).

120. *Clark v. Pennsylvania State Police*, 496 Pa. 310, 313, 436 A.2d 1383, 1385 (1981) (citing *Strank v. Mercy Hospital of Johnstown*, 383 Pa. 54, 117 A.2d 697 (1955); *H. Daroff & Sons, Inc. v. Vitullo*, 350 Pa. 501, 39 A.2d 595 (1944)).

121. See *supra* note 119.

122.

The basic aim of restitution is to place the plaintiff in the same economic position as he enjoyed prior to contracting. Thus . . . the plaintiff's recovery is for the reasonable value of service rendered . . . less the reasonable value of any counter-performance . . . The plaintiff recovers the reasonable value whether or not the defendant benefitted from the performance . . . (Of course,) the defendant must have received performance; acts merely preparatory to performance will not justify an action for restitution. (However), (i)f what the plaintiff has done is part of the agreed exchange, it is deemed to be "received" by the defendant.

CALAMARI & PERILLO, *CONTRACTS*, at 574 (footnotes omitted).

123. See, e.g., *In re Plywood Co. of Pa.*, 425 F.2d 151 (3d Cir. 1970). The presumption is that such clauses are penalties. *Kunkle & Jordan v. Wherry*, 189 Pa. 198, 42 A. 112 (1899) (one cannot profit by default of another by causing forfeiture). In ascertaining the reasonableness of the clause, the court must look to the language of the contract, the intention of the

ble depends on the facts of each case. When it is difficult to determine damages, however, and the amount is reasonable, the court is likely to enforce a damage clause.¹²⁴ If the couple could prove the amount was reasonable, they should be allowed to recover.¹²⁵

B. Breach During Pregnancy

This section explores the ramifications of breach by the surrogate or breach by the couple during pregnancy, as well as problems concerning paternity of the child. The provisions of the agreement focused upon here should be included in every surrogate mother contract.¹²⁶ The couple seeking the child should demand clauses stating that the surrogate will not abort in the absence of medical emergency,¹²⁷ she will seek appropriate medical care,¹²⁸ and she will refrain from personal activities which might endanger her health or the health of the fetus.¹²⁹

1. Promise not to abort.—Practically speaking, the only effect of a promise on the part of the mother not to abort¹³⁰ the fetus is

parties, the subject matter, the amount stipulated and the difficulty in measuring the breach in damages. *Id.* at 201-02, 42 A. at 112.

A clause providing rescission and restitution has been suggested by one attorney:

In the event the Surrogate and/or her Husband violate any of the provisions . . . this agreement may be immediately terminated by the Natural Father without any further liability . . . In the event the Natural Father does terminate the agreement, the Natural Father shall be under no obligation to pay any monies to the Surrogate or reimburse any of her expenses or her Husband's expenses. In addition, the Surrogate and her Husband must reimburse the Natural Father for all monies expended on her behalf pursuant to this agreement.

Brophy, *supra* note 9, at 279, sec. XVIII.

It is this author's opinion that a reasonable clause might also include attorney fees incurred for collecting any monies, as well as costs for obtaining substitute performance.

124. See Commonwealth Dept. of Environmental Resources v. Hartford Accident and Indemnity Co., 40 Pa. Commw. 133, 396 A.2d 885 (1970).

125. In Pennsylvania, intentional infliction of emotional distress is recoverable if the tort-feasor intended to inflict emotional distress and she did so by outrageous conduct. *Reist v. Manwiller*, 231 Pa. Super. 444, 449 n.4, 332 A.2d 518, 520 n.4 (1978) (citations omitted). Although tort remedies are beyond the scope of this Comment, the possibility of such an action is noteworthy.

126. See generally Brophy, *supra* note 9.

127. *Id.* at 280, section XX (stating surrogate will not abort the child absent medical emergency or the physiological abnormality of the fetus).

128. *Id.* at 282, section XXIV (stating surrogate agrees to adhere to medical instructions and regular examinations).

129. *Id.* (stating surrogate will not use cigarettes, alcohol, illegal drugs, or medication not prescribed by the specified physician).

130. Absent medical emergency it is illegal to abort a fetus after it has reached viability. 18 PA. CONS. STAT. § 3210 (1982). Therefore, the surrogate could only legally abort prior to this time. Viability is defined as that time, in light of the most advanced medical technology, which the fetus could survive with reasonable likelihood outside of the mother's womb with or without artificial support systems. *Id.* § 3203.

that it states clearly the intention of the parties. Clearly, in the event that the surrogate¹³¹ chooses to abort, the couple may pursue only limited remedies.

In light of the biological father's paternal interest in the child, he may seek to enjoin an intended abortion and compel performance. He would not meet with success, however, for two reasons. First, specific performance would require extensive supervision by the court because of the personal nature of performance.¹³² Second, the Supreme Court has recognized that abortion is the personal right of the pregnant woman and the consent of a putative father is unnecessary in order for a woman to proceed with abortion.¹³³

Thus, the couple may pursue only legal remedies which are measured in the form of losses caused and the gains prevented, less any savings incurred by the breach.¹³⁴ It is difficult to ascertain the gains prevented and the savings realized by the couple in the event of abortion.¹³⁵ The couple would be able to collect damages for all foreseeable expenses incurred in reasonable reliance on the contract.¹³⁶ Further, the couple would be entitled to full restitution for any amounts paid to the surrogate or expended on behalf of entering the agreement.¹³⁷

Of course, the couple could seek to enforce a liquidated damages clause. Again, whether a court would enforce such a clause de-

131. It is possible that the couple may seek to compel an abortion. However, such an attempt would be offensive to the surrogate's constitutionally protected right of privacy. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 n.11 (1976) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). Furthermore, Pennsylvania law prohibits a court or state official from ordering or coercing a woman to have an abortion absent a medical emergency. 18 PA. CONS. STAT. § 3215(f) (1982).

132. See *supra* notes 116-17 and accompanying text.

133. *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976). The argument might be advanced that the surrogate made a voluntary, knowing and intelligent waiver to her right of privacy. However, it seems such an argument would be moot. For instance, one may waive his right to remain silent after a criminal arrest, which means anything he says is of evidentiary value. It does not mean that he cannot later decide to reassert his rights and resume silence. See *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1963).

134. RESTATEMENT OF CONTRACTS § 329 (1933). Of course, damages could be analyzed as per restitution for benefits conferred upon the breacher; reliance interest for detriment incurred by breachee in reliance on the contract; and expectation interest for the lost prospect of gain. CALAMARI & PERILLO, § 14-4, at 522.

135. See *supra* notes 120-21 and accompanying text.

136. When the expectation interest is uncertain or nonexistent the aggrieved party can recover his reliance interest, that is, his expenses of preparation and part performance, as well as other foreseeable expenses incurred in reliance upon the contract. The assumption is that the "value of the contract at least would have covered the outlay." PERILLO & CALAMARI CONTRACTS at 532. For example, "a farmer who plants defective seed may or may not be able to prove what the value of his crop would have been if the seed had been of merchantable quality." If not, he is able to recover the value of the seed, the rental value of the land and the cost of preparing the land. *Id.* (footnotes omitted).

137. See *supra* note 122.

pend on whether the provision was intended to provide a reasonable estimation of damages, or to prevent breach by imposing a penalty.¹³⁸

2. *Promise to seek medical care.*—If the surrogate failed or refused to seek medical care during pregnancy, the couple could succeed in obtaining an injunction requiring the surrogate to do so. The problem of court supervision would be minimized as the contract should state the specific times the surrogate must see a doctor.¹³⁹ Therefore, if she failed to report for medical care the doctor need only inform the court, which would order her to seek such care. This action is justified, notwithstanding the fact that performance is still personal in nature, because the best interests of the child are now involved and the state's interest in the welfare of the child, at least after viability, outweighs the mother's right to privacy.¹⁴⁰

This remedy may be unappealing to the couple because the fitness of the surrogate to carry the fetus to term may now seem questionable. They could, therefore, resort to reliance and restitution damages,¹⁴¹ or damages under a liquidated damages clause.¹⁴² Eventually, however, the question of paternity may provide the surrogate with statutory remedies¹⁴³ in the form of support should she choose to give birth.

3. *Promise to refrain from activities detrimental to the health of the child.*—The couple may discover that the surrogate is addicted to nicotine, drugs or alcohol.¹⁴⁴ In this situation it is virtually impossible for a court to enjoin these activities without taking the surrogate into custody and monitoring her constantly.¹⁴⁵ The most realistic remedy is for reliance and restitution damages, or liquidated damages.¹⁴⁶

138. See *supra* note 123 and accompanying text.

139. See Brophy, *supra* note 9, at 283 (stipulating no fewer doctor visits than monthly during first seven months, bi-monthly during the eighth month, and weekly thereafter until birth).

140. See *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

141. See *supra* notes 133-35 and accompanying text.

142. See *supra* notes 119-24 and accompanying text.

143. See *infra* notes 153-60 and accompanying text.

144. See, e.g., N. KEANE & D. BREO, *THE SURROGATE MOTHER* 102-07, 109-10, 128-32 (1981) (tells of incident of surrogate who was addicted to both drugs and alcohol).

145. This supervision by the courts traditionally has not been tolerated. See *supra* note 117 and accompanying text.

146. In the event the surrogate breaches by refusing medical care or mistreating her health, another complex problem arises. Considering the best interests of the child, the biological father likely could not deny paternity once the child was born, which might subject him to claims for support for the child. If the couple rejects the child, is that in the child's best

4. *Breach by the biological father during pregnancy.*—Although it is unlikely that the couple will reject the child in utero,¹⁴⁷ the possibility exists. In that event, the surrogate could sue and recover the value of the contract.¹⁴⁸ Considering the likelihood that the surrogate would not want to keep the child, this remedy would hardly restore the status quo. Therefore, the surrogate could ask for statutory and contractual remedies.

The remedy most favorable to all parties, except the child, would be for the woman to abort the fetus and recover any costs incident thereto.¹⁴⁹ This choice, however, is entirely the surrogate's until the fetus reaches viability,¹⁵⁰ and is precluded by law after that point.¹⁵¹ Therefore, the parties may choose to proceed to birth and place the child for adoption.¹⁵²

An alternative for the surrogate is to proceed to birth and to establish paternity in the biological father.¹⁵³ If the surrogate were successful, she could obtain a support order¹⁵⁴ for the child.¹⁵⁵ Success would not be certain, however, if the surrogate was married.

Assuming the surrogate was married when she gave birth, the law presumes that the child is legitimately that of the surrogate's husband.¹⁵⁶ The presumption stands until a preponderance of the ev-

interest? Further, will the mother be able to support the child on her own? Clearly, the court cannot compel the couple to accept custody of the child. *See supra* note 121 and accompanying text. However, the court might compel support payments for the child. *See infra* notes 153-60 and accompanying text.

147. It has been said that couples use surrogate contracts as a last resort. *See Note, The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 822 (1982). It also has been argued that a couple would only breach if the child were defective. *See Coleman, supra* note 119, at 83, n.56.

148. *See supra* notes 114-15 and accompanying text.

149. The couple might assert this remedy under a theory of the duty to mitigate damages. *See CALAMARI & PERILLO, supra* note 112, at 538. However, the choice of abortion is a fundamental right of the pregnant woman and the court would not order such a remedy. *See supra* note 131.

150. *See supra* note 131.

151. 18 PA. CONS. STAT. § 3210 (1982).

152. *See* 23 PA. CONS. STAT. § 2101 *et seq.* (1985). The couple may decide not to breach, and instead pay the surrogate and place the child up for adoption themselves. If they do not pay, the surrogate could collect on the contract, plus collect any fees incurred proceeding to adoption. *See supra* notes 111-13 and accompanying text. In reality, such a remedy is simply enforcing the contract, and the couple could avoid the uncertainties of litigation by proceeding to adoption themselves.

153. 23 PA. CONS. STAT. § 4511 (1985).

154. 23 PA. CONS. STAT. § 4502 (1985). Yet both parents of an illegitimate child have the duty to support her. *See Commonwealth v. Rebovich*, 267 Pa. Super. 254, 258, 406 A.2d 791, 793 (1979).

155. The natural mother of an illegitimate child is not entitled to support. *Commonwealth v. Donnelly*, 14 Pa. D. & C.2d 40, 43 (1958).

156. *See R.J.K. v. B.L.*, 279 Pa. Super. 71, 74, 420 A.2d 749, 750 (1980).

idence demonstrates that the child is not that of the husband.¹⁵⁷ The mother, however, is a competent witness in a paternity action,¹⁵⁸ and the contract is strong evidence of intended paternity.

Even though the contract would seem to be an admission of paternity, the biological father would be entitled to other defenses, including access to the surrogate by her husband.¹⁵⁹ The court would likely order that the child, the mother, her husband and the putative father undergo blood tests.¹⁶⁰ After weighing all relevant factors, the court will decree an order for support provided the necessary burden of proof is met.

C. *Breach After Birth*

Breaches occur most often after the birth of the child. The surrogate, and her husband, if she is married, might decide to keep the child.¹⁶¹ On the other hand, the biological father might reject the child.¹⁶²

The timing of a post-birth breach is critical to the outcome of

157. 42 PA. CONS. STAT. § 6704(d) (1982). The older Pennsylvania statutes and case law held paternity cases as criminal actions, which made the evidentiary burden beyond a reasonable doubt. *See, e.g., Commonwealth ex rel. Leider v. Leider*, 210 Pa. Super. 433, 436, 233 A.2d 917, 918 (1967), *rev'd on other grounds*, 434 Pa. 293, 254 A.2d 306 (1969). The constitutionality of the lowering of the burden has been upheld. *See Minnich v. Rivera*, 509 Pa. 588, ____ A.2d ____ (1986).

158. 23 PA. CONS. STAT. § 2513(c) (1985).

159. In order to prove *non-access* by the husband the evidence must be clear, direct, satisfactory and irrefutable. *Commonwealth v. Savage*, 218 Pa. Super. 265, 267, 275 A.2d 832, 833 (1971). The presumption is that the husband has access to his wife, that is, that the child is legitimate. *Id.* at 267, 275 A.2d at 833.

160. 42 PA. CONS. STAT. § 6133 (1982). The presumption of legitimacy is overcome if *all* medical experts reviewing the results of the blood test agree that the putative father is not the actual father. 42 PA. CONS. STAT. § 6137 (1982).

161. Just such a case occurred in England. The judge granted custody to the surrogate who was formerly a prostitute. He did so because the woman had abandoned her former occupation and promised not to return to it because of the child! *Parade Magazine*, Feb. 11, 1979, at 14, col. 2. A similar case currently is being appealed in New Jersey. The surrogate complained of missing the infant child. The couple agreed to let her have custody for a week. When six policemen arrived at the surrogate's home to pick up the child, the surrogate passed the baby out the window to her husband, who fled to Florida. *New York Times*, Aug. 28, 1986, at 22, col. 1. The trial court has ruled in favor of the biological father, basing its holding on the fact that the contract was in the best interests of the child. In the Matter of Baby M, FM-25314-86E (Sup. Ct. N.J. Chancery Div., Family Part). *See supra* notes 45-46 and accompanying text.

162. A well-publicized case involved a child who was born with microcephaly (an abnormally small head which greatly increases chances of mental retardation). The biological father refused to pay for medical care of the child. A court ordered him to do so. He then denied that he was the father of the child. Both he and the surrogate's husband underwent blood tests and agreed to have the results announced on national television. The tests showed that the child was the surrogate's husband's. He then admitted to a previous child he had fathered who had died in infancy from microcephaly. *Transcript of Donahue Television Interview*, No. 02023, Feb. 2, 1983.

any dispute. If the breach occurs before the surrogate consents to adoption,¹⁶³ she is in a superior position to obtain custody of the child. Once the surrogate signs a valid consent to adoption, the contract is essentially completed; however, she still has the statutory action of revoking the consent.¹⁶⁴ Not until a decree for adoption or an order terminating the surrogate's parental rights is entered does the biological mother lose the right to refuse to the couple's adoption of the child.¹⁶⁵

1. *Breach before valid consent to adoption.*—Once the child is born the state has a compelling interest in the welfare of the child.¹⁶⁶ If the couple¹⁶⁷ rejects the child, it is certain that the surrogate could recover on the contract.¹⁶⁸ The surrogate could then choose to place the child with an adoption agency.¹⁶⁹ Any costs incurred by the surrogate in proceeding with adoption by a third party should also be recoverable because they are the foreseeable result of the breach.¹⁷⁰ Of course, the surrogate could opt to retain custody of the child and sue for child support after establishing paternity.¹⁷¹

If the surrogate refuses to consent to adoption or to deliver the child, one result is clear: the biological father's wife would not have standing to compel adoption,¹⁷² but the natural father would have

163. See 23 PA. CONS. STAT. § 2711(c) (1985) (no consent to adoption is valid if given prior to 72 hours after birth).

164. *Id.*

165. The earlier of the two decrees determines the date of the extinguishment of parental rights. *Id.*

166. See *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

167. The Comment addresses only a breach by the couple before the surrogate consents to adoption. It seems unlikely that the couple will breach after this point, because the health of the child should have already been ascertained. Even a later breach, however, would involve substantially the same remedies as discussed below.

168. See *supra* note 114-15 and accompanying text.

169. See 23 PA. CONS. STAT. §§ 2301 *et seq.* (1985).

170. Compensation is awarded only for those injuries that the breaching party had reason to foresee as a probable result of his breach. RESTATEMENT OF CONTRACTS § 330 (1933).

171. See *supra* notes 153-60 and accompanying text.

172. The reason for this is three-fold. First, the wife of the biological father is not a party to the contract. See Brophy, *supra* note 9, at 263-64. Second, the surrogate's consent to adoption is not valid until 72 hours after birth. 23 PA. CONS. STAT. § 2711(c) (1985). Cf. Keane, LEGAL PROBLEMS, *supra* note 17 (arguing that adoption statutes do not contemplate a situation whereby consent is given prior to conception, but only consent given while the mother is pregnant). *Id.* at 152-59. See also *supra* notes 32-33 and accompanying text. Third, the pertinent statute does not give her power to file for involuntary termination of parental rights.

A petition to terminate parental rights . . . may be filed by any of the following:

- (1) Either parent when termination is sought with respect to the other parent.
- (2) An agency.
- (3) The individual having custody or standing in loco parentis to the

the right to assert paternity¹⁷³ and to seek custody of the child.¹⁷⁴

Assuming the surrogate is granted legal custody of the child, she should return all monies paid by the father beyond certain medical expenses.¹⁷⁵ Generally, one who is unjustly enriched at the expense of another is entitled to restitution.¹⁷⁶ Clearly, the surrogate mother would be unjustly enriched by having had all her medical expenses paid and then refusing to relinquish custody.

The surrogate could also pursue an action for support.¹⁷⁷ It is anomalous that the surrogate could profit from such a breach by compelling the father to pay his share of child-rearing expenses. The court must consider the best interests of the child. Therefore, in the case of a single surrogate, the most equitable remedy would be to grant custody to the couple and perhaps grant visitation rights¹⁷⁸ to the surrogate.

In the event the surrogate is married, the result might differ depending on the fitness of the parents and the best interests of the

child and who has filed a report of intention to adopt required of section 2531 (relating to report of intentions to adopt).

23 PA. CONS. STAT. § 2512(a) (1985).

173. Arguably a putative father's right to assert paternity is less than the mother's right to bring a paternity action. Comment, *Womb For Rent*, *supra* note 92, at 247. The relevant statute allows the putative father to acknowledge paternity if the surrogate joins in the acknowledgement. 23 PA. CONS. STAT. § 8302 (1985). If the surrogate refuses to acknowledge his paternity, the father is left with the task of rebutting the strong presumption of the legitimacy of a child born in wedlock. 23 PA. CONS. STAT. § 8302 (1985). The father, however, receives no parental rights as to the child, except that the statute entitles him to notice of any hearing to terminate parental rights as to the child. 23 PA. CONS. STAT. § 8303 (1985).

The surrogate could conceivably take no action, which would ultimately sever the putative father's parental rights when the statute of limitations ran. 42 PA. CONS. STAT. ANN. § 6704(a) (1982) (six years, or two years beyond date of any voluntary support payment). However, such a result would clearly violate equal protection rights. See *Stanley v. Illinois*, 405 U.S. 645 (1972). The Court in *Stanley* held that, "by denying [an unwed father] a hearing and extending it to all other parents whose custody of their children is challenged, the state denied the unwed father equal protection of the laws." *Id.* at 649.

174. See *infra* notes 186-205 and accompanying text.

175. This is gleaned from the result in *Gorden v. Cutler*, 324 Pa. Super. 35, 471 A.2d 449 (1983) (the court compelled a woman, who had accepted payment of medical expenses in exchange for a promise to allow the couple to adopt, to repay the monies after she breached the agreement).

176. RESTATEMENT OF RESTITUTION § 1 (1937). The surrogate might attack such a claim by asserting that custody contracts are voidable and that the court should leave the parties in the position in which it found them. *Gorden v. Cutler*, 324 Pa. Super. 35, 471 A.2d 449 (1983). Such a defense should fail, however, for the reason that even a voidable agreement can give rise to a claim for damage under quasi-contract. CALAMARI & PERILLO, §§ 1-12. Quasi-contract is also called implied-at-law contract. *Id.* In reality, there is no agreement. However, it is an obligation imposed by law where one has been unjustly enriched to the detriment of another. *Id.*

177. 23 PA. CONS. STAT. § 4501 (1985). See also *supra* notes 149-55 and accompanying text.

178. See *infra* notes 200-205 and accompanying text.

child.¹⁷⁹ Assuming the court decides to grant custody to the surrogate and her husband, it would only be equitable to declare that the surrogate's husband is the father in fact, and that the child is not entitled to support from the natural father.

2. *Rights after consent to adoption.*—Once the surrogate executes a valid adoption consent, the contract is completed. The surrogate does have the statutory right of revoking the consent any time before the court enters an adoption decree, or a parental-rights termination decree.¹⁸⁰ This places the couple in an awkward position. The contract has been fully performed, but the statute might deny them the full benefit of their bargain. One remedy, albeit unsatisfactory, is full restitution of the contract.

The couple's best course would be to pursue an action against the surrogate for involuntary termination of parental rights.¹⁸¹ In determining the rights of a parent the court shall give primary consideration to the needs and welfare of the child.¹⁸² The Superior Court interprets the statutory test as:

[Whether] a parent has demonstrated a continued inability to conduct his or her life in a fashion that would provide a safe environment for the child, whether that child is living with the parent or not, and the behavior of the parent is irremediable as supported by clear and competent evidence . . .¹⁸³

Certainly this test is a huge hurdle for the couple to overcome. All things being equal, it is unlikely that the couple would succeed in such an action,¹⁸⁴ but failure does not completely terminate the biological father's right to custody of the infant.¹⁸⁵

179. See *infra* notes 185-205 and accompanying text.

180. 23 PA. CONS. STAT. § 2711(c) (1985).

181. 23 PA. CONS. STAT. § 2511 (1985). The couple's position would be favorable once the child has been in their custody for 6 months and the surrogate has made no attempt to exercise parental duties toward the child. See *infra* note 193. The couple in the *Baby M* case succeeded in involuntarily terminating the rights of the surrogate mother, which allowed the biological father's wife to adopt the child. See *supra* note 2.

182. 23 PA. CONS. STAT. § 2511(b) (1985). However, the court should not decide on the basis of environmental factors which are beyond the control of the parent. *Id.*

183. In re Adoption of Michael, 506 Pa. 517, 525, 486 A.2d 371, 375 (1984). The dissent argued that the mother should be given the opportunity to care for the child before parental incapacity can be proven with clear and convincing evidence. *Id.* at 525-26, 486 A.2d at 376 (Flaherty, J., dissenting).

184. It is reasonable to assume that the parents and/or their agent will have thoroughly investigated the surrogate before entering that agreement. Therefore, it is likely that she is a "fit" parent.

185. This discussion assumes that the father acknowledged paternity and the surrogate joined in the acknowledgement. This rebuts any presumption that the surrogate's husband is the father of the child. See 23 PA. CONS. STAT. § 8302 (1985).

In determining a custody dispute the court is primarily concerned with the best interests of the child,¹⁸⁶ regardless of legitimacy.¹⁸⁷ The court must determine this factual dispute on a case-by-case basis.¹⁸⁸ Although courts previously relied on a series of presumptions in paternity disputes, the trend has been to abolish any presumptions.¹⁸⁹

For example, there is no longer a presumption that a mother should always receive custody of an infant child.¹⁹⁰ The presumption that a natural parent should raise the child is also abolished,¹⁹¹ as is the presumption that custody law favors two parent families.¹⁹² The "sole criterion in determining custody disputes is the best interests and permanent welfare of the child."¹⁹³

All things being equal,¹⁹⁴ the typical fact situation has the infant child in the custody of the couple who are fit as competent parents. The surrogate, on the other hand, is also likely to be a fit and competent parent and may even be married. In such a situation the amount of time the couple had custody of the child might control.¹⁹⁵

186. See, e.g., *Commonwealth ex rel. Children's Aid Society v. Gard*, 362 Pa. 85, 93, 66 A.2d 300, 305 (1949); *In re Hawthorne*, 146 Pa. Super. 20, 22, 21 A.2d 521, 523 (1941). The Pennsylvania legislature has declared that the public policy of the Commonwealth is for shared custody of the child, when that is in the best interest of the child. 23 PA. CONS. STAT. § 5301 (1985).

187. See *Commonwealth ex rel. Lewis v. Tracy*, 155 Pa. Super. 257, 260, 38 A.2d 405, 406 (1944).

188. See *Commonwealth ex rel. McKee v. Reitz*, 193 Pa. Super. 125, 128, 163 A.2d 908, 910 (1960).

189. See *Commonwealth ex rel. Jordan*, 302 Pa. Super. 421, 429, 448 A.2d 1113, 1117 (1982).

190. See *Tobias v. Tobias*, 248 Pa. Super. 168, 374 A.2d 1372 (1977).

191. See *In re Custody of Hernandez*, 249 Pa. Super. 274, 376 A.2d 648 (1977).

192. See *Commonwealth ex rel. Jordan v. Jordan*, 302 Pa. Super. 421, 429, 448 A.2d 113, 117 (1982).

193. *In re Custody of Phillips*, 260 Pa. Super. 402, 405, 394 A.2d 989, 990 (1978). *Jordan v. Jordan*, 302 Pa. Super. at 429, 448 A.2d at 1117 (court should avoid mechanical determinations and focus its analysis on the particular facts relevant to the child's best interest).

194. This is a very generous assumption. Other factors could be: length of custody by the couple; fitness of the couple; and living environment. For simplicity, however, this comment considers all parties are of equal "parental fitness" regarding these other factors.

195. *In re Adoption of Baby Boy J.*, ____ Pa. Super. ____, 512 A.2d 689 (1986):

Parental rights may be terminated if a parent, by conduct continuing for a period of at least six months, either has evidenced a settled purpose of relinquishing his parental claim to his child or has refused or failed to perform parental duties (23 Pa. C.S.A. § 2511(a)). The performance of parents duties is an affirmative obligation to love, protect, support and maintain communication and association with the child. Consequently, being a parent is more than a passive state of mind, it is an active occupation, calling for a constant affirmative demonstration of parental love, protection and concern. A parent must exert himself to take and maintain a place of importance in the child's life.

(cited in *In re Stickler*, ____ Pa. Super. ____, ____, 514 A.2d 140, 142 (1986).

The Superior Court has held:

[T]hat where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker. Not to do so ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs.¹⁹⁶

The court may award shared custody¹⁹⁷ if it determines that such an arrangement would be in the best interest of the child.¹⁹⁸ This result is unlikely. First, the child has not formed a relationship with the surrogate.¹⁹⁹ Second, considerable animosity is likely to exist between the parties which might frustrate joint decision-making.²⁰⁰

Notwithstanding the fact that the couple should be awarded custody, the surrogate might still seek visitation rights.²⁰¹ In a visitation proceeding the first concern is the best interest of the child.²⁰² Usually, to destroy or limit visitation rights is against public policy.²⁰³ Finally, visitation orders are temporary in nature and are subject to modification.²⁰⁴ Therefore, if visitation adversely affects the child, the court can remove the rights.²⁰⁵

196. *Jordan v. Jordan*, 302 Pa. Super. at 421, 425, 448 A.2d 1113, 1115 (1977).

197. Shared custody is often referred to as joint custody. However, it does not necessarily contemplate shared physical custody of the child. What it does entail is joint decision making between both parents on all major decisions affecting the child. *See Miller, Joint Custody*, 13 FAM. L.Q. 345, 360 (1979).

198. 23 PA. CONS. STAT. § 5301 (1985) (stating that shared custody is preferred when in the best interest of the child).

199. In awarding shared custody, it is necessary that the child has formed a relationship with both parties seeking custody. *In re Wesley*, 299 Pa. Super. 504, 515, 445 A.2d 1243, 1248-49 (1982).

200. At least some degree of cooperation between the parties is an important consideration. *Id.* at 516, 445 A.2d at 1249. However, at least one court has speculated that joint custody might attenuate any animosity between the parties. *Id.*

201. *See* 23 PA. CONS. STAT. § 5301 *et seq.* (1985).

202. *See, e.g., In re Stuck*, 291 Pa. Super. 61, 435 A.2d 219 (1981); (*Commonwealth v. Rozanski*, 206 Pa. Super. 397, 213 A.2d 155 (1965)).

203. *See, e.g., In re Stuck*, 291 Pa. at 64, 435 A.2d at 220-21, *Spells v. Spells*, 250 Pa. Super. 168, 175, 378 A.2d 879, 883 (1977); *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa. Super. 42, 344 A.2d 553 (1975).

204. *In re Stuck*, 291 Pa. at 64, 435 A.2d at 221; *see also Freidman v. Freidman*, 224 Pa. Super. 530, 307 A.2d 292 (1973).

205. *In re Stuck*, at 64-65, 435 A.2d at 221. The couple might advance the argument that visitation rights are not in the best interests of the child in a surrogate situation. For instance, they might assert that visitation by the surrogate may only confuse the child, and that ultimately the child might be harmed psychologically. However, such an argument is beyond the scope of this Comment.

IV. Conclusion

There have been numerous calls by legal commentators for the enactment of legislation which will govern surrogate parenting agreements. In the absence of such legislation, considering the wealth of statutory material and case law dealing with custody, adoption, support and other areas of family law, it appears that courts are currently well-equipped to deal with any problems arising from such a contract.

If the legislatures were to take any specific action, it should be merely to declare that surrogate motherhood contracts are not illegal or in contravention of public policy. The state should go no further, except perhaps to define certain terms and generally regulate the practice. The courts are in the position to view each of these contracts on a case-by-case basis, and to provide for appropriate remedies with an eye towards traditional family law. The legislatures cannot contemplate all the situations surrounding a breach, and should leave the courts a free hand to fashion remedies that fit the circumstances.

Of course, the legislature could not provide that surrogate agreements are specifically enforceable. Instead, the agreements should remain voidable, but not void. Because the surrogate parenting situation is legally complicated, the parties must be extremely diligent in structuring the agreement and choosing the other party. Any person or couple contemplating such an arrangement would be well advised to consider the inability to specifically enforce the contract. For no matter how desperately they seek a child, any dispute must necessarily be resolved in light of the best interest and welfare of the child.

John M. Suender

